Supreme Court, U. S.
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No. 76-1271

In the Supreme Court of the United States

OCTOBER TERM, 1976

THOMAS WARNER HOOPES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner argues that the Fifth Amendment bars his conviction for failure to file tax returns, that he did not receive adequate assistance of counsel, and that the trial judge should have recused himself.

Petitioner is a dentist and had approximate incomes of $44,324 and $41,503 in 1971 and 1972, respectively (II-R. 19, 31-32, 72).[1] For both years he filed Forms 1040 containing only his name and address. Across each form was written, "under protest I plead the Fifth Amendment to the U.S. Constitution; also Article I-Sec. 8, 10, the First, Fourth,

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[1]The record in this Court consists of four volumes: "I-R." designates the pretrial proceedings. "II-R." designates the trial transcript. "III-R." designates the clerk's transcript (pleadings). "Supp. R." designates the proceedings in the court of appeals.

Seventh, Tenth and Fourteenth Amendments to same" (Pet. App. B, p. B-3).

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted on two counts of willfully failing to file income tax returns for 1971 and 1972, in violation of 26 U.S.C. 7203. The court sentenced him to two consecutive prison terms of one year and fined him $10,000 on each count (III-R. 61). The court of appeals affirmed (Pet. App. B, pp. B-1 to B-7).

1. Petitioner argues (Pet. 8-14) that his conviction is barred by the Fifth Amendment and this Court's decisions in *United States* v. *Sullivan*, 274 U.S. 259, and *Garner* v. *United States*, 424 U.S. 648. But the Fifth Amendment does not protect a person against criminal liability for refusing to disclose the amount of his income on a tax return. In *United States* v. *Sullivan, supra*, the Court rejected a bootlegger's claim that the Fifth Amendment supported his failure to file a tax return, stating that "[i]t would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime" (274 U.S. at 263-264). While the Court suggested in *Sullivan* that the privilege against self-incrimination might in some circumstances justify a refusal to answer specific questions on a return, it held that a person "could not on that account refuse to make any return at all" (*id.* at 263). Here, petitioner has made no return at all because the Forms 1040 that he filed gave no information from which his tax liability could be computed. See, *e.g.*, *United States* v. *Daly*, 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States* v. *Porth*, 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824. Petitioner therefore was properly convicted for failure to file a return under the standard of *Sullivan*.

Nor does *Garner* v. *United States, supra*, support petitioner. In that case, the defendant's income tax returns, in which he stated he was a gambler, were introduced into evidence as proof of the federal gambling offense with which he was charged. In rejecting the argument that the admission of such evidence violated the defendant's privilege against compulsory self-incrimination, the Court reasoned that he could have refused to answer the question on the tax return as to his occupation and therefore the disclosure on his return had not been "compelled" within the meaning of the Fifth Amendment (see 424 U.S. at 649-653, 662). Thus *Garner*, like *Sullivan*, recognizes that a taxpayer may properly invoke his privilege as to specific questions on a return, but neither decision allows a taxpayer to invoke the privilege as a basis for a wholesale refusal to report income.

2. Petitioner further argues (Pet. 14-16) that the trial judge should have recused himself, asserting that the judge knew that petitioner had signed a petition asking that the judge be impeached, that petitioner had openly supported legislation to have the judge stripped of his power as chief judge, and that petitioner had earlier filed a suit in federal court in which the judge was named as an adverse party, and also that the judge had characterized petitioner as a tax protestor. But petitioner's single motion for disqualification filed in the trial court (see III-R. 5-26) did not allege any of these facts. Petitioner can hardly be heard to argue that the trial judge erred in refusing to disqualify himself on the basis of allegations not made in the motion for disqualification. Moreover, petitioner did not raise this question in the court of appeals and therefore it is not appropriately presented here. *Lawn* v. *United States*, 355 U.S. 339.

At all events, even if petitioner's present allegations are true, the facts that the trial judge knew that petitioner had previously signed a petition to have the judge impeached,

that petitioner had supported legislation to have the judge removed as chief judge, and that petitioner had filed a suit in federal court in which the judge was named as an adverse party[2] would not have required the trial judge to recuse himself. *United States* v. *Bray*, 546 F. 2d 851, 858 (C.A. 10); *United States* v. *Garrison*, 340 F. Supp. 952, 956-957 (E.D. La.). Indeed, if the rule were otherwise, every criminal defendant would be able to disqualify any and all judges assigned to try his case simply by, for example, making derogatory remarks about the judge in public and filing frivolous suits against him. See *United States* v. *Fujimoto*, 101 F. Supp. 293, 296 (D. Hawaii), motion for leave to file petition for writ of prohibition or mandamus denied *sub nom. Fujimoto* v. *Wiig*, 344 U.S. 852.

3. Finally, petitioner contends (Pet. 16) that his attorney did not provide him with effective assistance. But petitioner did not complain about the assistance of his counsel, who served in both the district court and the court of appeals, until his petition for rehearing in the court of appeals. In that document (Supp. R. 8), petitioner criticized counsel's failure to rely on this Court's *Sullivan* and *Garner* decisions, and petitioner incorporates that claim by reference here (see Pet. 16). But since neither of these decisions support petitioner's Fifth Amendment claim (see pp. 2-3, *supra*), there is no basis for his argument that his attorney's failure to rely upon them deprived petitioner of the effective assistance of counsel.

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[2]Petitioner did file a suit in the federal district court, naming the trial judge as one of the defendants. See *Hoopes, et al.* v. *Ritter, et al.*, C.A. 10, No. 76-1721, decided February 11, 1977.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.